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In the Supreme Court of the United States

OCTOBER TERM, 1959

DALTON STOCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (P.R. 53-58)[1] is reported at 273 F. 2d 754.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1960 (P.R. 59). A petition for re-

[1] The petitioner has filed as the record the briefs and appendices filed by the government and petitioner in the court of appeals. The blue-covered government brief and appendix will be referred to as "R." Petitioner's appendix below, which was paginated separately from his brief but bound together with it, will be referred to as "P.R."

hearing was denied on February 16, 1960 (P.R. 60). The petition for a writ of certiorari was filed on March 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether entrapment was shown as a matter of law.

2. Whether statements made by petitioner to an agent concerning his previous conduct were admissible as going to the question of entrapment.

STATEMENT

The petitioner was convicted in the United States District Court for the Southern District of Illinois on twelve counts charging illegal possession and sale on six occasions of a total of 403 wild ducks in violation of the Migratory Bird Treaty Act [2] (P.R. 7-16; 41-44). He was sentenced to sixty days' confinement, followed by two years' probation, and to fines on each count ranging from $100 to $275 (P.R. 45-50).

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[2] The Migratory Bird Treaty Act, as amended, 49 Stat. 1555 (16 U.S.C. 703-711), was passed to implement the conventions signed for the protection of migratory birds between the United States and Great Britain, 39 Stat. 1702, and the United States and the United Mexican States, 50 Stat. 1311. The Act provides that regulations to enforce the treaties are to be adopted by the Secretary of Interior and are effective when approved. Sections 2-4, 16 U.S.C. 703-705. The possession limit for the area involved here is eight wild ducks during the open season. See, *e.g.*, 50 C.F.R. (1958 Supp.) 6.51(d) and 22 Fed. Reg. 7049. Sale of wild ducks is prohibited, except in accord with regulations not here applicable. Section 2 of the Act, 16 U.S.C. 703; see 50 C.F.R. (1958 Supp.) 6.9-6.31.

The pertinent evidence may be summarized as follows:

Anthony M. Stefano, a criminal investigator for the Department of Interior, Fish and Wildlife Service, testified that he worked as an undercover agent in this case, using the name Mark DeMarco (P.R. 23). He previously had been supplied information as to illegal "market hunting activities" (*i.e.*, duck selling) by certain individuals (R. 28).

The agent met the petitioner at the latter's home in Beardstown on October 30, 1956, and inquired whether petitioner took people out hunting (R. 29). Petitioner told the agent that he charged ten dollars for this service, but that hunting was not yet too good. Petitioner suggested that the agent come back in two or three weeks (R. 30).

On November 3, 1956, the agent again met petitioner and told him that he had been hunting elsewhere but had no luck. He asked whether petitioner had any ducks. Petitioner said that he had none and "didn't know of anyone in Beardstown that had killed any ducks up to that date" (R. 31). When the agent told petitioner that he would pay for the ducks, petitioner replied that he did not have any on hand (R. 31-32). The agent testified (R. 32):

> * * * Then he told me that he had done a lot of market hunting in the past, and that he had always received a good price for his ducks. He said, however, he said this, he said lately I have cut it out because I have got a good job in Chicago, but he said, I'm going to go back into it

because they are getting a pretty good price for ducks around Beardstown.

Petitioner told the agent that he would try to get him some later at $2.00 per duck (R. 32).

On November 23, or 24, 1956, the agent and petitioner agreed to go duck hunting, which they did on November 26 (R. 32-33). Petitioner told the agent that the "fellows" were scared of him because the agent had Minnesota license plates on his car and a new federal agent had moved in from Minnesota. The agent explained that his company had transferred him to Illinois from Minnesota and he had not had an opportunity to change license plates (R. 34). They then went hunting. When they approached the blind, the petitioner called out that he was bringing a federal agent. The agent was not introduced to the others in the blind (R. 36). The agent's gun jammed and he quit shooting without getting any ducks, but the petitioner shot four (R. 37). The petitioner then picked up four more from a pile in the blind and they left (R. 38). The agent mentioned that he could use more than eight. Petitioner repeated that they were scared of him, so on request the agent showed petitioner some false credentials (R. 39; P.R. 23).

The petitioner asked how many ducks he wanted, and the agent said that it would depend on the price. The petitioner said that he had some "contacts" who would want $2.00 apiece and he would do this "as a favor" for the agent (R. 40). Petitioner volunteered that he had received $2.00 when he had hauled his ducks to Chicago and had received $1.75 when he sold

ducks in Springfield (R. 41-42). Petitioner suggested that the agent contact him in a month (R. 42).

On December 30, the agent met petitioner in the latter's home and petitioner made a telephone call to someone to bring the ducks over (R. 47, 49). When the agent complained about the $2.00 price, petitioner suggested that they talk it over (R. 49-50). A person called Jack Hardy arrived shortly thereafter (R. 50-51).[3] The agent offered to take the entire lot of 125 at $1.50 apiece but finally agreed to take 75 ducks at $1.75 each (R. 52) and to pick them up in a lot next to a grocery store (R. 53). The agent parked his car in the lot and then returned to observe petitioner and Hardy at petitioner's back entrance carrying two crates (R. 54, 58). Delivery was subsequently made in the alley behind petitioner's residence (R. 54-55). Petitioner asked the agent how many he wanted the next time and the agent said about fifty but inquired as to the price. Petitioner guaranteed that they would cost only $1.50 next time (R 57).

Petitioner later telephoned the agent to pick up the next group (R. 60). On January 6, 1957, when the agent arrived, petitioner asked if he could use an additional fifty. The agent refused, stating that he only had money for the agreed amount (R. 60-61). These ducks were then delivered (R. 61).

On November 12, 1957, the agent negotiated for fifty more ducks at $1.25 apiece (R. 63-67) and on

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[3] This person is subsequently identified as Michael Stell (R. 73).

January 31, 1958, for forty ducks (R. 68-72) which petitioner told him were part his. In discussing the previous sales, petitioner said that it was the first time he "ever sold ducks for any less than $1.75" (R. 73). The next sale, on February 24, was of 95 ducks, of which 65 came directly from the petitioner's deep freeze (R. 75-79). The final sale was on March 9, 1958, when petitioner sold the agent 93 ducks from his deep freeze and told how he and two others had killed 115 ducks on the previous November 26 (R. 80-82).

The agent testified that he then asked petitioner whether the story was true that he had pulled a gun on two federal agents. Petitioner's counsel stated "I'm going to object." The court held the evidence admissible as part of the transaction. The agent related that petitioner told him that he had raised his gun at two agents and said, "Now, you git," and that he had sold the ducks in Chicago (R. 83).

The petitioner did not take the stand but offered the rebutting evidence of two other persons who had participated in his activities (P.R. 29). The court submitted the case to the jury under a charge which included an instruction on the defense of entrapment (P.R. 38-39). The jury found petitioner guilty on all twelve counts (P.R. 41-44).

The court of appeals ruled that the facts did not show entrapment as a matter of law (P.R. 56) and that the issue was properly submitted to the jury under instructions to which no objection was made by petitioner's counsel. The court also held that evidence of petitioner's "market hunting in the past"

was admissible to meet the defense of entrapment (P.R. 57).

ARGUMENT

1. The petitioner contends that the evidence shows entrapment as a matter of law. The record, however, demonstrates that the government agent acted merely as a decoy to a person who had been and was in the business of illegally marketing wild ducks. The first time the sale of wild ducks was broached by the agent, petitioner did not refuse but merely stated that he was unable to supply ducks because there were not "any on hand" (R. 32). Petitioner then immediately admitted that he had sold ducks before and was "going to go back into it because they are getting a pretty good price * * *" (R. 32). The agent made no appeals to sympathy, mutual friends, nor any inducement of possible exorbitant gains. In fact, the government agent refused to deal at the high price suggested by petitioner, but repeatedly and successfully attempted to purchase the ducks at a lower price. The jury was, therefore, justified in finding that there was no entrapment. The most the government agent did was to "afford opportunities or facilities for the commission of the offense"; he clearly did not "implant in the mind of an innocent person the disposition to commit the alleged offense." *Sorrells* v. *United States*, 287 U.S. 435, 441, 442; see *Sherman* v. *United States*, 356 U.S. 369, 372; *Masciale* v. *United States*, 356 U.S. 386.

2. Petitioner complains of the introduction into evidence of statements made by him in the course of

his dealings with the government agent. These statements consisted of admissions of having done market hunting in the past (R. 32), of the price he had sold ducks for on the market (R. 41), of killing more than the limit (R. 67, 82), of planning to hunt in order to market the ducks (R. 74), and of previously threatening government agents with a gun (R. 83).

The short answer is, that except for the last item, no objection was made to this testimony, and on the last item, the only objection was an equivocal "I'm going to object" (see *supra*, p. 6). Thus, in effect, petitioner's counsel recognized that this testimony was a part of the whole transaction. *St. Clair* v. *United States*, 154 U.S. 134.

In any event, such matters were clearly admissible in view of the defense of entrapment. The petitioner "cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells* v. *United States*, *supra*, 287 U.S. at 451; *Sherman* v. *United States*, *supra*, 356 U.S. at 373.[4]

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[4] Petitioner's suggestion (Pet. 9) of a conflict among the circuits is without merit and is, in fact, based upon decisions fully consistent with the holding of the court of appeals here. *Sang Soon Sur* v. *United States*, 167 F. 2d 431 (C.A. 9), held that convictions for possession of opium could not be admitted in an income tax evasion case, since the former were completely independent and unrelated crimes. And *Harper* v. *United States*, 239 F. 2d 945 (C.A. D.C.), recognized the admissibility of similar offenses as to the issue of intent.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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